No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* COALITION FOR A SUSTAINABLE DELTA, SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, AND WESTERN GROWERS ASSOCIATION IN SUPPORT OF PETITIONER

PAUL S. WEILAND
ROBERT D. THORNTON
NOSSAMAN LLP
18101 Von Karman Avenue
Suite 1800
Irvine, CA 92612
(949) 833-7800
pweiland@nossaman.com
rthornton@nossaman.com

Counsel for Amici Curiae Coalition for a Sustainable Delta and Western Growers Association

DANIEL J. O'HANLON
Counsel of Record
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
400 Capitol Mall, 27th Fl.
Sacramento, CA 95814
(916) 321-4500
dohanlon@kmtg.com

JON D. RUBIN
REBECCA R. AKROYD
SAN LUIS & DELTA-MENDOTA WATER AUTHORITY
400 Capitol Mall, 28th Fl.
Sacramento, CA 95814
(916) 321-4519
jon.rubin@sldmwa.org
rebecca.akroyd@sldmwa.org

Counsel for Amicus Curiae San Luis & Delta-Mendota Water Authority

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICI CURIAE*[1]

The San Luis & Delta-Mendota Water Authority (SLDMWA) consists of twenty-eight public water agencies serving approximately 2.1 million acres within the western San Joaquin Valley, San Benito, and Santa Clara counties in California. SLDMWA operates and maintains certain federal Central Valley Project facilities, delivering up to 3 million acre feet of water per year within SLDMWA's member agencies' service areas, which include some of the most productive farmland in the country, the Silicon Valley, and the largest contiguous wildlife refuge west of the Mississippi River.

Coalition for a Sustainable Delta (Coalition) is a non-profit comprised of agricultural water users and individuals in the San Joaquin Valley in California. The Coalition and its members depend on reliable water supplies from California's Sacramento-San Joaquin Delta for their livelihoods and economic well-being. The purpose of the Coalition is to (1) promote the long-term, ecological health of the Sacramento-San Joaquin Delta and its native species and (2) ensure a sustainable, reliable water supply for persons and entities engaged in agricultural pursuits in the San Joaquin Valley.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* and their counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amici curiae* file this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

Western Growers Association (WGA) is a trade association that represents local and regional family farmers growing fresh produce in Arizona, California, and Colorado. WGA members and their workers provide over half the nation's fresh fruits, vegetables, and tree nuts, including nearly half of America's fresh organic produce. WGA advocates in legislative, regulatory, and judicial forums to ensure that environmental policy is informed by sound science and proven data.

Members of SLDMWA, the Coalition, and WGA must operate within the limitations imposed by the federal government under the Endangered Species Act (ESA) and a myriad of other environmental statutes. Increasingly, these statutes significantly influence how and to what extent regulated entities, including SLDMWA, the Coalition, and WGA, are able to access vital natural resources such as water. SLDMWA, the Coalition, and WGA have an interest in ensuring that agency administration and application of these statutes is subject to effective judicial review, consistent with the separation of powers established by the Constitution. This case highlights the importance of that interest.

SUMMARY OF ARGUMENT

The growth of the Executive Branch within our constitutional democracy is, to a degree, a predictable byproduct of our increasingly complex society. It is also a consequence of the increasing inability of the Legislative Branch to reauthorize many of the statutes initially enacted during the 1970s, including the ESA, which now comprise the modern body of environmental law. Even so, the exercise of power by the Executive

Branch remains subject to the strictures imposed by the Constitution. The functions of Congress in enacting the laws and the Judiciary in interpreting them are well established. The functions of the Judiciary, such as judicial review of agency decisions, take on greater, rather than lesser, importance in the context of the growth of the Executive Branch. Unfortunately, judicial review of agency decisions has been severely constrained by judicially-created doctrines requiring deference to both agency legal and technical determinations. These doctrines, which generally trace back to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) impact the way in which courts review agency decisions and ultimately whether there is room for the courts to decide what the law is and correct agency errors. The Judiciary's constitutional role has been further undermined in the context of the ESA by the notion that the requirements imposed by the ESA trump those imposed by other statutes and must be implemented without regard to cost. The Court's ESA jurisprudence post *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), as well as amendments to the statute itself, shows that this notion is misguided.

These transgressions are not academic. This case is a prime example of how judicial review of agency decision-making is essential to enforcing the Constitution and laws and to promoting the separation of powers. Congress adopted the ESA to serve an important purpose, but implementation of the ESA often comes with substantial societal costs. Blind deference to agency legal determinations can lead to a

circumstance where (as here) agency authority is unmoored from the language and intent of the ESA. Similarly, blind deference to agency technical determinations can lead to a circumstance where (again, as here) courts rubber stamp agency conclusions. In both of these circumstances, agency action can impose significant costs on regulated entities. It can also lead to a circumstance where listed species are denied the degree of protection Congress intended.

The Court should rule for Petitioner, and in doing so emphasize the limits on Executive Branch authority to interpret the law and restore the vitality of the hard look doctrine as a yardstick for judicial review of agency decisions under the ESA and other federal statutes.

ARGUMENT

I. THE JUDICIARY HAS A CONSTITUTIONAL DUTY TO INTERPRET THE LAW

A. JUDICIAL REVIEW OF AGENCY DECISION-MAKING IS ESSENTIAL

As the Court examines the U.S. Fish and Wildlife Service's (Service) designation of private land that cannot presently support the dusky gopher frog as unoccupied critical habitat and the agency's decision not to exclude areas from a critical habitat designation because of the economic impact of the designation, it should be mindful of the purpose of judicial review.

First, judicial review of government action exists to enforce the Constitution and laws. In *Marbury v. Madison*, 5 U.S. 137 (1803), the Court ruled that federal courts have the power to declare

unconstitutional acts by the Executive and the Legislature. "[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Marbury*, 5 U.S. at 180. In the more than 200 years since *Marbury*, judicial review has been "essential to enforcing the Constitution and to ensuring that no person, not even the president, is above the law." Erwin Chemerinsky, *Opinion, The Power of Judicial Review: Erwin Chemerinsky*, Los Angeles Daily News (May 3, 2017, 1:02 PM), https://www.dailynews.com/2017/05/03/the-power-of-judicial-review-erwin-chemerinsky/. Without the power of judges to enforce the Constitution, it "is no more than words on old parchment that is kept under glass." *Id.*

Second, judicial review serves as a necessary check on the exercise of power by the Executive and Legislative branches of government. "Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J. concurring). Hence, James Madison observed "in these explicit terms: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.'" *Id.* (quoting The Federalist No. 47, p. 301 (C. Rossiter ed. 1961)). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J. concurring).

Relative to "the growing power of the administrative state," *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., joined by Kennedy, J. and Alito, J., dissenting), the Judiciary's duty to review agency decision-making is therefore especially important. Agency decision-making of the type involved in the present case involves the exercise of legislative and executive powers by a single body. *See City of Arlington*, 569 U.S. at 1877-78. Mindful of *liberty*, this Court in reviewing the Service's decisions "should not defer to [the Service] until the [C]ourt decides, on its own, that the agency is entitled to deference." *Id.* at 1877.

Courts have already determined that critical habitat designations are subject to judicial review under section 704 of the Administrative Procedure Act. *E.g.*, *ALCOA v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1160 (9th Cir. 1999) ("The [APA] governs judicial review of administrative decisions involving the [ESA]."). And wisely so. Without judicial review, courts would be foreclosed from serving as a check on potentially arbitrary or capricious conduct by federal agencies.

Critical habitat designations have implications for "hundreds of thousands of rural citizens." Matthew Groban, *Arizona Cattle Growers' Association v. Salazar: Does the Endangered Species Act Really Give a Hoot About the Public Interest It "Claims" To Protect?*, 22 Vill. Envtl. L.J. 259, 279 (2011). In California alone, the federal wildlife agencies have designated more than 20 million acres of land and waters as critical habitat. Br. of Amici Curiae Coalition, SLDMWA, and WGA in Support of Pet'rs Writ of Cert. Ex. 1, Aug. 11, 2017.

Judicial review provides an essential check on the Service's power and protects individual property rights and liberties. *See Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of [agency] employees."). However, without *effective* judicial review, separation of powers cannot operate as intended under the Constitution, and persons impacted by agencies' interpretation and application of federal statutes are denied the benefit of independent review.

B. THE EXPANSION OF THE *CHEVRON* DOCTRINE UNDERMINES JUDICIAL REVIEW OF AGENCY DECISION-MAKING

Since this Court's issuance of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "[b]y and large, the history of the *Chevron* doctrine has been one of triumphal expansion." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 838 (2001). *Chevron's* journey from a case regarding an arcane air quality rule to an eponymous doctrine ubiquitously applied as a pillar of administrative law is remarkable. The *Chevron* doctrine's expansion has had a tangible impact on the way in which courts review agency decisions.

Perhaps because *Chevron* was an environmental case, it took hold within the environmental law context first. *Id.* Through time the doctrine has "gradually displaced formulations about deference developed in other fields, including those with substantial bodies of

precedent that preexisted *Chevron* and deviated from it in important respects, such as labor law and tax law." *Id.* at 838-39 (citations omitted).

While the doctrine's history of application to different types of legal issues and agency interpretations (*Chevron's* "domain") has been uneven and complicated, overall, it is marked by a pattern of expansion. The *Chevron* doctrine is now, arguably, applicable to some informal agency interpretations that are not the product of a formal adjudication or notice-and-comment rulemaking, *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001) ("[A]s significant as notice-and-comment is in pointing to Chevron authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded."); *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting that "the presence or absence of notice-and-comment rulemaking [was not] dispositive" in *Mead Corp.*, 533 U.S. at 218); to agencies' interpretations of their own authority or jurisdiction, *City of Arlington v. FCC*, 569 U.S. 290, 303 (2013) ("The U.S. Reports are shot through with applications of Chevron to agencies' constructions of the scope of their own jurisdiction."); and to agency interpretations that conflict with published judicial opinions, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.").

Chevron's incursion into a range of legal fields and issues is important because the deferential regime that courts employ in part determines whether and to what extent courts will engage in independent interpretation of the law. In 2017, Kent Barnett and Christopher J. Walker published an article that presents the findings of the largest empirical study of *Chevron* in the circuit courts. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017). Barnett and Walker attempted to capture all published decisions over an eleven-year period in which the circuit courts referred to *Chevron*, and from that pool of decisions, assembled a dataset of 1,327 decisions in which the circuit courts reviewed agency interpretation of statutes. *Id.* at 21-27. Barnett and Walker found that:

> the application of the Chevron framework seems to make a meaningful difference as to whether agencies prevail on the interpretive question. Indeed, there was nearly a twenty-four-percentage-point difference in win rates when the circuit courts applied Chevron deference (77.4%) than when they refused to apply it (53.6%). The agency was twice as likely (77.4% to 38.5%) to prevail if the court applied Chevron deference as opposed to reviewing the interpretation de novo and nearly three-fourths more likely (77.4% to 56.0%) to prevail under Chevron than Skidmore. In other words, agencies won more in the circuit courts when Chevron deference applied, at least when the court expressly considered whether to apply Chevron deference.

Id. at 30-31; *see also* Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1, 31 (1998) (presenting the results of an empirical study finding that "courts resolving applications at [*Chevron*] step one upheld the agency interpretations only 42% of the time . . . and those resolving applications at step two upheld the agency view in 89% of the applications").

Barnett and Walker modestly conclude, "In sum, using agency-win rates as an admittedly less-than-perfect heuristic to assess the meaningfulness of deference regimes, as others before us have done, we see that *deference regimes appear to matter*." Barnett & Walker, *supra*, at 32 (emphasis added). However, as any party that has repeatedly confronted *Chevron* deference in attempts to obtain judicial relief knows, deference regimes not only appear to matter, but most certainly do matter. This case, *Weyerhaeuser Co. v. Fish and Wildlife Service, et al.*, is a prime example.

What if the Court were to pull in the reins on *Chevron* and allow courts to reclaim their rightful interpretive authority? Prior to joining the Court, Justice Gorsuch addressed just such a question:

> [W]hat would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to

> exercise their independent judgment about what the law is. Of course, courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of a statute. But *de novo* judicial review of the law's meaning would limit the ability of an agency to alter and amend existing law. It would avoid the due process and equal protection problems of the kind documented in our decisions. It would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election. And an agency's recourse for a judicial declaration of the law's meaning that it dislikes would be precisely the recourse the Constitution prescribes — an appeal to higher judicial authority or a new law enacted consistent with bicameralism and presentment. We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change — except perhaps the most important things.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring). *Chevron* should be set aside, or at minimum significantly modified. If the Court retains some aspect of *Chevron*, it should affirm Judge Silberman's observation that "*Chevron's* second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." *Global*

*Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017) (Silberman, J., concurring).

II. THE REFUSAL OF THE JUDICIARY TO REVIEW AGENCY TECHNICAL DETERMINATIONS IS BASED ON AN OVER-EXPANSIVE READING OF *BALTIMORE GAS & ELECTRIC* AND IS IMPROPER

In addition to invoking *Chevron* to justify its holding that land that is not habitable by a species is "essential for the conservation of the species," the court of appeals invokes *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) for the proposition that when courts are reviewing agency scientific determinations, they must be at their most deferential. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 465 (5th Cir. 2016). Like *Chevron*, *Baltimore Gas & Electric* was an environmental case. It involved a challenge to a decision of the Nuclear Regulatory Commission (NRC) under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. In upholding the decision of the NRC that permanent storage of certain nuclear wastes would have no significant environmental impact, the Court expressly affirmed the NRC's assumption that there was zero chance that the nuclear waste would be released into the environment.

The Court explained:

> A reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific

> determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.

462 U.S. at 103.

While this Court has neither revisited nor even cited *Baltimore Gas & Electric* in the past quarter century, the case has greatly influenced lower courts. Travis O. Brandon, *Fearful Asymmetry: How the Absence of Public Participation in Section 7 of the ESA Can Make the "Best Available Science" Unavailable for Judicial Review*, 39 Harv. Envtl. L. Rev. 311, 343 (2015). The deference accorded to agency scientific determinations under *Baltimore Gas & Electric* has come to be known as super deference. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 Mich. L. Rev. 733 (2011).

Meazell offered a scathing critique of the doctrine of super deference built on *Baltimore Gas & Electric*.

> Super deference is not grounded in realistic notions of agency science; it may contribute to ossification and the science charade; and it appears to have a disparate impact on environmental law. Measured against broader administrative-law values, super deference also inhibits transparency; undermines deliberation; fails to accord with political accountability; and generally abdicates the courts' role in the constitutional scheme by encouraging outcome-oriented review.

Id. at 737-38 (footnotes omitted).

Traditional deference under the Administrative Procedure Act, 5 U.S.C. § 706(2), and the record review doctrine, which reserves to federal agencies the ability to determine the scope of the record on review, already stack the odds in favor of the federal government. In this context, as Meazell points out, the time-tested hard look doctrine[2] applied by the courts strikes a reasonable balance by promoting transparency, deliberation, and accountability, and situating the courts in their proper position as judicial watchdogs. Meazell, *supra*, at 737-38, 784. The alternative—application of super deference to agency scientific and technical determinations—is akin to "a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably." *Ethyl Corp. v. Envtl. Prot. Agency*, 541 F.2d 1, 69 (D.C. Cir. 1976), *cert. denied* 426 U.S. 941 (1976) (Leventhal, J., dissenting).

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[2] The doctrine was first applied in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) and *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971). This Court implicitly endorsed the hard look doctrine in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983). *See* Merrick Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 543-549 (1985) (providing a thorough discussion of the *State Farm* decision as an endorsement of the hard look doctrine).

III. *TVA V. HILL* DOES NOT JUSTIFY READING THE ESA AS SUPPORTING WHATEVER INTERPRETATION MAXIMIZES SPECIES PROTECTION

The Court's first and probably most widely-known decision involving the ESA is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (*TVA v. Hill*). In that case the Court held that ESA section 7 barred completion of the Tellico Dam, because the completed dam would likely cause the extinction of the snail darter fish. The Court found that the ESA was "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost," and that section 7 "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *TVA v. Hill*, 437 U.S. at 180, 184, 185. ESA section 7, the Court found, "admits of no exception," and hence completion of the dam was precluded, despite the millions of dollars already invested. *Id.* at 173.

This sweeping language in *TVA v. Hill* has led litigants, and sometimes courts, to call for the ESA's terms to mean whatever offers the greatest protection for listed species. That call will likely be repeated in this case. The Court's ESA jurisprudence since *TVA v. Hill* makes clear, however, that the ESA should not be read to override all other interests in the name of maximum species protection.

The Court has addressed the ESA in four cases since *TVA v. Hill*. The first, *Lujan v. Defenders of*

Wildlife, 504 U.S. 555 (1992), was decided on grounds of Article III standing, and hence did not delve into the ESA's substantive provisions. The second was *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). *Sweet Home* involved a regulation defining the term "take," and presented the issue whether take could include habitat modification that only indirectly injures a listed species. The Court held it may, and that a regulation so providing was permissible under the ESA. *Sweet Home*, 515 U.S. at 698. But in doing so the Court carefully defined limits on the reach of potential liability for take, explaining that to establish liability for illegal take requires meeting "ordinary requirements of proximate causation and foreseeability" and that the act involved must "actually kill[] or injure[]" particular members of the listed species. *Id.* at 700 n.13. The proof requirements set out in *Sweet Home* thus narrowed the potential for enforcement based on modification of habitat, granting some protection for landowners facing uncertainty over permissible uses of their property.

The third case was *Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett* a unanimous Court held that the citizen suit provision of the ESA, 16 U.S.C. section 1540(g), allows any person to sue for violations of the ESA, including persons whose commercial, agricultural, recreational or other economic interests may be impaired by application of the ESA. *Bennett*, 520 U.S. at 176-77. That is, the Court declined to limit citizen suits to those persons seeking greater protection of listed species. For ESA-related claims brought under the Administrative Procedure Act, the Court found that economic interests are within the zone of interests protected by the ESA. For example, the

requirement that the agencies use the best scientific data available is intended "to ensure that the ESA not be implemented haphazardly, on the basis of speculation" and "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.* at 176-77. Thus, *Bennett* makes clear that the ESA should be read and applied according to all its terms, including terms that temper or limit regulation intended to benefit listed species.

Finally, the Court addressed the ESA in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). In *Home Builders* the Court held that a regulation adopted by the Services properly limited section 7 consultation to discretionary agency actions. That is, federal agencies are not required to consult on actions that are mandated, that they lack discretion to avoid taking. *Home Builders*, 551 U.S. at 664-69. The Court held the Environmental Protection Agency therefore had no obligation to consult regarding its delegation of permitting authority under the Clean Water Act to the State of Arizona, where the provision of the Clean Water Act governing delegation did not allow for additional potential criteria arising from ESA consultation. *Id.* at 661-73. *Home Builders* teaches that while section 7 may bar federal agencies from carrying out discretionary actions, such as the action at issue in *TVA v. Hill*, section 7 does not apply to and hence does not bar agencies from fulfilling nondiscretionary duties. Once again, the Court recognized that the ESA applies within a framework of multiple objectives and interests, and that pursuit of protection of listed species does not always override other interests.

In sum, it is often argued that the sweeping language of *TVA v. Hill* justifies reading the ESA's provisions regarding designation of critical habitat broadly, so at to maximize protection for listed species. But this Court's ESA jurisprudence demonstrates that is not the correct approach. The ESA, like other statutes serving important purposes, must be reasonably construed in accordance with its terms. Like other statutes, it has limits, and requirements that are intended to balance achievement of its purposes with avoiding unnecessary or undesirable impacts to other interests. The present case offers the Court another opportunity to make that clear.

IV. AGENCY APPLICATION OF THE ESA WITHOUT THE BENEFIT OF EFFECTIVE JUDICIAL REVIEW CAN HAVE SIGNIFICANT CONSEQUENCES ON THE USE OF LAND AND WATER RESOURCES

Three aspects of the ESA make an expansive application of its provisions particularly problematic for private landowners and water users. First, a few may be asked to bear the cost of preserving species for the benefit of many. For example, the last landowner with habitat suitable for a listed species who seeks to develop her property may be constrained from doing so, because others have developed their properties sooner, and she owns what has become the last remaining habitat. Or, the water user whose diversion is subject to consultation under ESA section 7 may be required to leave water in the river to compensate for the effects of many other diversions that are not subject to such consultation. Second, the ESA is a federal law that directly regulates use of private land and water

resources. It thus can become a tool under federal law for requiring changes to or limits on use that the traditional regulators of land use and water rights, state and local governments, have decided not to impose. Third, for the most part the ESA lacks cost-benefit and cost-effectiveness standards that might otherwise shape regulatory implementation. The designation of critical habitat is one of the few areas where economic impacts come into play, but as the facts in this case illustrate, that consideration can be very limited in practice. These aspects of the ESA call for a careful review of its application. It is one thing for such burdens to be imposed by Congress; it is something else for such burdens to be imposed by agencies through an overly-expansive interpretation of the ESA's terms, or zealous, but unintelligent application of the act. *See Bennett*, 520 U.S. at 176-77.

Another feature of the ESA requiring careful judicial scrutiny arises from the mixed scientific and legal judgments it requires. To make a listing decision under section 4 of the ESA, for example, the Secretary of the Interior is required to identify any species "in danger of extinction throughout all or a significant portion of its range" based on threats such as loss of habitat, disease or predation, or overutilization for commercial purposes. 16 U.S.C. §§ 1531(6), 1533(a)(1). The Secretary must make this decision "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b). As another example, under section 7 of the ESA, each federal agency must insure that its actions will not jeopardize the continued existence of a listed species, again using the best scientific data available. 16 U.S.C. § 1536(a)(2). Such determinations require a mix of scientific and legal,

and perhaps policy, judgments. There can be a temptation on the part of the agencies and also the courts to characterize these determinations as scientific or technical in nature, to invoke super deference (discussed above) and insulate them from meaningful judicial review.

An example of judicial deference to an agency's application of the ESA, one that involved these *amici*, is found in *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014). The case involved a challenge to a biological opinion (BiOp) issued under ESA section 7 regarding the effects of federal Central Valley Project and California State Water Project operations on a listed fish, the delta smelt. While there are many causes for the delta smelt's decline, under ESA section 7, the focus of the BiOp is on the action involved. The Service found that proposed operations of the Central Valley Project and the State Water Project would jeopardize the fish, and specified a reasonable and prudent alternative to avoid jeopardy that resulted in substantial loss of water supply. The district court found that the BiOp included serious errors, and remanded it. *Delta Smelt Consol. Cases v. Salazar*, 760 F. Supp. 2d 855 (E.D. Cal. 2010). On appeal, the Ninth Circuit agreed the BiOp had significant flaws, explaining:

> the BiOp is a bit of a mess. And not just a little bit of a mess, but, at more than 400 pages, a big bit of a mess. And the FWS knew it. . . . The BiOp is a jumble of disjointed facts and analyses. . . . It is a ponderous, chaotic document, overwhelming in size, and without the kinds of signposts and roadmaps that even

> trained, intelligent readers need in order to follow the agency's reasoning.

San Luis & Delta-Mendota Water Authority, 747 F.3d at 604-06. But, applying the doctrine of super deference, the court found the BiOp was good enough to withstand judicial review, and reversed the district court. *Id.* at 606-27.

Under that deferential standard, a poorly explained and poorly supported agency action has been allowed to continue to diminish precious water supplies for much of California. The United States Bureau of Reclamation has estimated that on a long-term annual average, the BiOp, paired with a related salmonid biological opinion issued in 2009, will reduce Central Valley Project water deliveries by 335,000 acre-feet annually, and reduce State Water Project deliveries by 773,000 acre-feet annually. U.S. Bureau of Reclamation, *Coordinated Long-Term Operation of the Central Valley Project and State Water Project Final Environmental Impact Statement* 5-100-05 (2015). One million acre-feet of water is enough to supply approximately 2,500,000 of California's households for a year, or to irrigate approximately 325,000 acres of California's farmland for a year. William B. DeOreo, *California Single Family Water Use Efficiency Study* 26 (2011); Renée Johnson & Betsy A. Cody, *California Agricultural Production and Irrigated Water Use* 15 (2015). The BiOp's requirements intended to protect delta smelt have been in effect since 2008. Yet, since 2008, the delta smelt and salmonid species' relative abundance has reached new lows, calling into question the premises of the BiOp and the efficacy of its measures directed at water project operations. FMWT

Delta Smelt Annual Abundance Indices (all ages), 1967-2017, Cal. Dep't of Fish and Wildlife, http://www.dfg.ca.gov/delta/data/fmwt/Indices/sld002.asp; GrandTab 2018.04.09: California Central Valley Chinook Population Database Report, Cal. Dep't of Fish and Wildlife, https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=84381&inline.

CONCLUSION

How did we get to a place where federal agencies are allowed to designate land uninhabitable by a protected species as critical habitat for that species? The answer is, in part, that the court of appeals combined different conceptions of deference to agency conduct in implementing the ESA in a manner that made judicial review a charade. *Meaningful* judicial review of agency decisions is essential as a counterbalance to the Executive Branch. The expansion of the *Chevron* and *Baltimore Gas & Electric* doctrines and the misguided notion that the ESA is a statute subject to a different standard have left organizations and individuals across the country without the opportunity for effective judicial review of highly consequential agency decisions. We urge you to rule for Petitioner and in so doing adhere to Constitutional strictures by reinvigorating meaningful judicial review.

Respectfully submitted,

PAUL S. WEILAND
ROBERT D. THORNTON
NOSSAMAN LLP
18101 Von Karman Avenue
Suite 1800
Irvine, CA 92612
(949) 833-7800
pweiland@nossaman.com
rthornton@nossaman.com

Counsel for Amici Curiae Coalition for a Sustainable Delta and Western Growers Association

DANIEL J. O'HANLON
Counsel of Record
KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
400 Capitol Mall, 27th Fl.
Sacramento, CA 95814
(916) 321-4500
dohanlon@kmtg.com

JON D. RUBIN
REBECCA R. AKROYD
SAN LUIS & DELTA-MENDOTA
WATER AUTHORITY
400 Capitol Mall, 28th Fl.
Sacramento, CA 95814
(916) 321-4519
jon.rubin@sldmwa.org
rebecca.akroyd@sldmwa.org

Counsel for Amicus Curiae San Luis & Delta-Mendota Water Authority